

EXHIBIT A

Proposed Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

SC SJ HOLDINGS LLC, *et al.*¹

Debtors.

Chapter 11

Case No. 21-10549 (JTD)

(Jointly Administered)

Ref. Docket No. 71

**ORDER UNDER BANKRUPTCY CODE SECTION 502(c) AND BANKRUPTCY RULE
3018 ESTIMATING ACCOR'S CLAIM FOR FEASIBILITY PURPOSES**

Upon the Motion Of Debtors For Order Under Bankruptcy Code Section 502(c) and Bankruptcy Rule 3018 Estimating Maximum Amount Of Contingent And Unliquidated Claim Of Fairmont Hotels & Resorts (U.S.) Inc. (the “Estimation Motion”),² by which the Debtors moved for entry of an order (this “Order”) estimating the amount of the contingent and unliquidated claims of Accor Management US Inc. (f/k/a Fairmont Hotels & Resorts (U.S.) Inc.) (“Accor”) against the Debtors arising from rejection, breach and/or termination of that certain Amended and Restated Hotel Management Agreement dated December 2, 2005, as amended (the “HMA”), and that certain Owner Agreement dated January 2, 2018 (the “Accor Claim”); and this Court having found that the Estimation Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that due and sufficient notice of the Estimation Motion has been given; and after due deliberation thereon; and good and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. For the reasons stated in the transcript of the hearing held on the Estimation Motion on June 29, 2021 attached hereto as **Exhibit A** (the “Hearing Transcript”), which is incorporated

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, include: SC SJ Holdings LLC (5141) and FMT SJ LLC (7200). The mailing address for both Debtors is 3223 Crow Canyon Road, Suite 300 San Ramon, CA 94583.

² Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Estimation Motion.

herein by reference, the Estimation Motion is granted in part and denied in part, as further set forth herein.

2. For the reasons set forth in the Hearing Transcript, the Debtors' request for estimation of the Accor Claim for all purposes is denied because it is not required to prevent undue delay. Instead, pursuant to Bankruptcy Code section 502(c), the Accor Claim is hereby estimated, for the limited purpose of determining feasibility of the Debtors' Joint Chapter 11 Plan (as may be amended, supplemented, or otherwise modified from time to time) (the "Plan").

3. For the reasons set forth in the Hearing Transcript, the Accor Claim is estimated in the maximum amount of \$22.24 million (the "Estimated Amount"). For the sake of clarity, the Estimated Amount does not include any amount that may be owed by the Debtors to Accor for outstanding management fees and reimbursable expenses, or for indemnification and/or reimbursement.

4. Because the Court is estimating for the limited purpose of Plan feasibility, it is not required to make any specific findings of fact on the merits of the Accor Claim, and any findings made on the merits of the Accor Claim in connection with this Order are not binding on the arbitrators in the arbitration of the Accor Claim currently pending before the American Arbitration Association.

5. The terms of this Order are immediately effective and are enforceable upon its entry.

6. The Court shall retain jurisdiction to hear any and all disputes arising out of the interpretation or enforcement of this Order.

Exhibit A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Chapter 11
SC SJ HOLDINGS, LLC, et al, . Case No. 21-10549(JTD)
Debtors. . 824 Market Street
Tuesday, June 29, 2021

TRANSCRIPT OF VIDEO HEARING RE:
COURT DECISION ON ESTIMATION MOTION REGARDING
CLAIM OF ACCOR MANAGEMENT U.S., INC.
BEFORE THE HONORABLE JOHN T. DORSEY
UNITED STATES BANKRUPTCY JUDGE

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transcript produced by transcription service.

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COURT DECISION

3

1 (Proceedings commence at 11:00 a.m.)

2 THE COURT: Good morning, everyone. This is Judge
3 Dorsey. We are on the record in SC SJ Holdings, LLC, Case
4 Number 21-10549.

5 I see from the agenda the only thing going forward
6 is my ruling on the estimation motion. Is there anything
7 else we need to talk about before we get to the main event?

8 (No verbal response)

9 THE COURT: No? Okay. Can everyone hear me?
10 Okay. I want to make sure everyone can hear me.

11 UNIDENTIFIED: Yes, Your Honor.

12 UNIDENTIFIED: Yes.

13 THE COURT: All right.

14 UNIDENTIFIED: Yes, Your Honor. Thank you.

15 UNIDENTIFIED: Good morning.

16 THE COURT: All right. So this is my ruling on the
17 estimation hearing.

18 Debtors moved for an estimation of a Accor
19 Management's rejection damages claim for all purposes,
20 including determining the liquidation value of that claim.
21 Accor opposes the motion, arguing that it should be
22 liquidated through arbitration, as provided for in the
23 underlying amended and restated hotel management agreement or
24 HMA. I previously lifted the automatic stay to allow that
25 arbitration proceeding to go forward.

1 Debtors claim that waiting for the arbitration
2 proceeding to conclude will cause undue delay in their
3 Chapter 11 case. Accor counters that, while liquidation of
4 their claim through arbitration will take somewhat longer
5 than an estimation proceeding, it will not cause undue delay
6 to the bankruptcy process. In the alternative, Accor argues
7 that, if I were inclined to estimate, it should be for the
8 limited purpose -- for a limited purpose, rather than final
9 adjudication. For the reasons I will explain, I agree with
10 Accor's alternate suggestion.

11 Debtor SC SJ owns the hotel currently known as the
12 Fairmont San Jose, the hotel, having purchased it on January
13 2nd, 2018. The hotel comprises 20 stories with 805 rooms and
14 suites and 65,000 square feet of meeting and event space.
15 Debtor FMT leases the hotel from SC SJ. Accor is the hotel
16 management company that has managed the hotel since 1987,
17 when it first opened. Prior to the petition date, Accor
18 managed the hotel subject to the amended and restated HMA
19 dated December 2, 2005.

20 Although I previously lifted the stay to allow the
21 arbitration to proceed, I also concluded that I would proceed
22 with claim estimation, reserving until the hearing on
23 estimation the scope of what that estimation would take.
24 During the preliminary hearing on debtors' motion, I found
25 that there were issues of fact that required an evidentiary

1 hearing.

2 That evidentiary hearing was held on June 10 and
3 11, 2021, with closing arguments made on June 17, 2021.
4 During the hearing, two witnesses testified live, five
5 witnesses testified via video deposition, and four
6 declarations and nearly one hundred exhibits were entered
7 into evidence.

8 Prior to the start of the evidentiary hearing on
9 June 10, 20201, I heard arguments relating to two motions in
10 limine brought by the debtors. The first motion was to
11 exclude the reports of Accor's expert witnesses John Dent and
12 Greig Taylor. I allowed Mr. Dent's testimony on industry
13 standards at the time the HMA was executed, but not on
14 matters of law or the interpretation of the HMA. With
15 respect to Mr. Taylor, I allowed him to testify and indicated
16 I would determine the weight and relevance of his testimony
17 after trial.

18 The debtors' second motion in limine sought to
19 exclude the pre-bankruptcy marketing efforts of the debtors;
20 that is, debtors' efforts to find a new manager for the hotel
21 prior to breach of termination. Debtors argued that the pre-
22 breach termination marketing efforts were irrelevant to the
23 estimation of breach termination damages under the liquidated
24 damages provision of the HMA. Accor argued that these
25 marketing efforts were relevant, as they supported its

1 argument that there were potential contractual breaches prior
2 to the first petition date on March 5, 2021, specifically
3 breaches of the covenant of good faith and fair dealing and
4 quiet enjoyment and rejection damages. On those grounds, I
5 denied the motion and allowed the evidence.

6 Debtors purchased the hotel on January 2, 2018,
7 assuming the already existing HMA. The HMA includes a
8 liquidated damages clause, which describes the compensation
9 for Accor if the debtor were to breach terminate the
10 contract. The liquidated damages clause is included in part
11 because Accor's actual damages in the event of a breach
12 termination, quote, "would be difficult or impossible to
13 determine."

14 The liquidated damages amount is based on the
15 management fees paid to Accor over the most recent twelve-
16 month period, times a multiplier to reflect the remaining
17 length of the contract.

18 On March 11th, 2020, the World Health Organization
19 declared COVID-19 a pandemic, inciting a series of lock-down
20 orders and virtually shutting down the hotel industry, among
21 others. Following this, the revenue of the hotel dropped
22 precipitously. Sam Hirbod, the CEO of the debtors' parent
23 company and ultimate beneficial owner of the hotel notified
24 Accor of the hotel's need for capital in June of 2020.

25 The debtors retained Jones Lange LaSalle later that

1 summer in order to raise capital. The debtors then retained
2 CHMWarnick on September 14, 2020, in order to discuss raising
3 capital with other hotel operators as part of a potential re-
4 brand.

5 Prior to retaining CHMWarnick, Mr. Hirbod alleges
6 that he, quote:

7 "-- made it clear to Wayne Buckingham, the Chief
8 Operating Officer of Accor, that the debtors were looking at
9 any and all potential possibilities, including all potential
10 brands, all major brands, including considering the
11 termination of the HMA. That conversation was had at least
12 three different times prior to the debtors even talking to
13 CHMWarnick."

14 Mr. Hirbod says -- Mr. Hirbod says he never named
15 Hilton explicitly in these conversations.

16 Heather McCrory, CEO of Accor Hotels North and
17 Central America, contested this, stated that Wayne
18 Buckingham, now retired, never told her that Hirbod was
19 negotiating with the other brands, and he would have
20 certainly done so, had he been told.

21 After retaining CHMWarnick, the debtors entered
22 discussions with major hotel brands, including Hilton. On
23 October 6, 2020, a Hilton representative toured the hotel
24 incognito, in order to prepare a property improvement plan,
25 or PIP. Following this, on October 23, 2020, Hilton sent a

1 pro forma and PIP to Mr. Hirbod to further the discussions
2 over potential capital injection and management of the hotel.
3 On October 27, 2020, Mr. Hirbod sent a mezzanine letter of
4 intent to Hilton, in order to demonstrate market interest in
5 the hotel.

6 On October 29, 2020, Mr. Hirbod called Heather
7 McCrory. Ms. McCrory testified that she was not told prior
8 to or during this call that the debtors or CHMWarnick had
9 already approached other hotel brands. After this call, Ms.
10 McCrory wrote a letter to Mr. Hirbod, telling him that Accor
11 would not cooperate in attempts to re-brand the hotel. On
12 November 10, 2020, Accor denied the debtors' request for a
13 tortious interference waiver.

14 On December 15, 2020, Maxine Taylor of CHMWarnick
15 sent an email to various other parties at CHMWarnick, stating
16 that she anticipated termination of the HMA, quote, "sometime
17 in the first quarter" of 2021. She acknowledged that the
18 value of the liquidated damages clause would drop at a rate
19 of, quote, "\$2 million a month over the next two months."

20 On February 4, 2021, Mr. Hirbod informed Accor of
21 his intention to breach terminate the HMA effective March 10,
22 2021. On February 23, 2021, the debtors retracted the
23 previously sent termination letter on the stated belief that
24 Accor might provide capital. Later that same day, Mr. Hirbod
25 received definitive notice that Accor would not provide

1 capital. The HMA was subsequently terminated on March 5,
2 2021 with the closure of the hotel by the debtors.

3 11 U.S.C., Section 502(c) requires Bankruptcy
4 Courts to estimate contingent or unliquidated claims when
5 liquidating the claim in the non-bankruptcy setting would,
6 quote, "unduly delay the administration of the case." There
7 is significant leeway granted to judges in how and when to
8 estimate claims, provided they are estimated, quote:

9 "-- in accordance with the legal rules that will
10 govern the final amount of the claim."

11 In Re World Armstrong Industries, 348 B.R. 111, at
12 123 (D. Del. 2006).

13 This Court has previously found that, quote:

14 "-- estimation is mandatory, provided that the
15 movant establishes that fixing or liquidation of a claim
16 would unduly delay the administration of the case."

17 In Re RNI Wind Down Corporation, 369 B.R. 174, at
18 191 (Bankr. D. Del. 2007).

19 Absent a finding of undue delay, estimation is
20 discretionary. Id. at 191.

21 There's no dispute between the parties that Accor's
22 claim is unliquidated. The only dispute is whether
23 liquidating the claim in the normal course will cause undue
24 delay in the debtors' bankruptcy.

25 To rise to the level demanded by Section 502(c),

1 the delay must be something more than the proposition that
2 liquidation will take longer than estimation. In Re Dow
3 Corning Corporation, 211 B.R. 545, at 563 (Bankr. E.D. Mich.
4 1997) .

5 Quote:

6 "From the plain language of Section 502(c), it is
7 clear that estimation does not become mandatory merely
8 because it may take longer and thereby delay administration
9 of a case. Liquidation of a claim, in fact, will almost
10 always be more time consuming than estimation."

11 Quote:

12 "Bankruptcy law's general rule is to liquidate, not
13 to estimate."

14 In Re Dow Corning Corporation, 211 B.R. at 563.

15 Quote:

16 "For estimation to be mandatory then, the delay
17 associated with liquidation must be 'undue.' Something is
18 undue if it is unjustifiable."

19 Id. at 563.

20 The debtors argue that Accor's claim must be
21 estimated or it will substantially delay the bankruptcy, add
22 costs they cannot afford, and cause them to miss RSA
23 milestones, which are necessary for plan support. They more
24 specifically argue that emergence from bankruptcy hinges on
25 securing a new brand operator and \$45 million of exit

1 financing, likely through a mezzanine loan. Debtors contend
2 this is unlikely without greater certainty regarding Accor's
3 claim. The debtors further argue that the current plan is
4 expressly conditioned on the liquidation of Accor's claim.

5 I am not convinced by the debtors' argument. They
6 bore the burden of proving that estimation was necessary in
7 order to avoid undue delay in these proceedings; however, the
8 bulk of their fears have turned out to be unsubstantiated.

9 Hilton Cigna has been selected as the prevailing
10 bidder and is to become the new brand manager. While their
11 bid remains non-binding, Mr. Hirbod testified at the
12 disclosure statement hearing on June 1, 2021, that this did
13 not trouble him. That's transcript at Page 14, Lines 16
14 through 25.

15 Additionally, the debtors have asserted that there
16 are at least two entities, including JPMorgan, who are
17 interested in funding the mezzanine loan. Like Hilton's bid,
18 the mezzanine financing remains non-binding. Once again,
19 however, Mr. Hirbod testified at the disclosure statement
20 that this also did not concern him. That's transcript, Page
21 19, 14 -- Lines 14 through 16.

22 Debtors argue that the Hilton bid requires all
23 claims, including Accor's to be paid or discharged as a
24 condition of closing; however, Mr. Hirbod has committed on
25 the record to, quote:

1 "-- pay the real estate secured debt that is owed,
2 the one and a half million that is owed, plus the Accor
3 Fairmont claim, with no limit on the" -- with, quote, "no
4 limit on the amount he is willing to pay in order to confirm
5 a plan."

6 Transcript of the evidentiary hearing, Page 36,
7 Line 5, through Page 36, Line 18. It's also referring back
8 to the disclosure statement hearing at DI-386.

9 Mr. Hirbod went even further, when asked at the
10 disclosure statement hearing, about the lack of mezzanine
11 financing or capital infusion in Hilton's bid, when he
12 testified that, quote:

13 "It did something better. It said you can
14 basically choose your mezz and I will fully guarantee the
15 principal."

16 That's the disclosure statement hearing transcript,
17 Page 46, Line 23 through Page 47, Line 1.

18 This guarantee by Mr. Hirbod and Hilton's corporate
19 guarantee makes it significantly less likely that Hilton or
20 any potential mezzanine financier will be unwilling to proceed
21 with closing on the deal. The debtors presented no evidence
22 to the contrary at the estimation hearing.

23 The debtors asserted that this guarantee by Mr.
24 Hirbod is taken out of context, that Mr. Hirbod's guarantee
25 is limited to roughly \$4 million for the Accor claim, based

1 on the underlying disclosure statement. I disagree. The
2 disclosure statement clearly states, quote:

3 "Fairmont contends that it's entitled to nearly \$30
4 million in breach of contract damages."

5 That's the disclosure statement, Page 36, DI-391.

6 While the disclosure statement goes on to say that
7 the debtors dispute the validity of this amount, there is no
8 doubt that Mr. Hirbod was aware of that amount in dispute
9 when he committed to paying the entire amount without
10 limitation.

11 The debtors also focus on -- a fair amount of their
12 argument on the theory that the arbitration will take longer
13 than estimation. That is likely true based on the record
14 before me. However, the fact that arbitration will take
15 longer than estimation does not, in and of itself, mean that
16 the case will be unduly delayed. Despite the debtors'
17 protestations, both parties appear to be actively
18 participating and moving arbitration forward. Therefore, I
19 do not find that the fact that arbitration is not as fast as
20 estimation is sufficient to establish undue delay in this
21 case.

22 Because the debtors' primary concerns supporting
23 their argument for undue delay are no longer relevant, I find
24 that they have failed to meet their burden of proving that
25 estimation is mandatory in this case. However, I am

1 persuaded by the debtors' argument that the plan itself is
2 contingent on assigning a value to Accor's claim in order to
3 establish feasibility. Therefore, I find it is prudent to
4 exercise my discretion and estimate Accor's claim; however, I
5 will do so only to address the limited concern of feasibility
6 to allow the plan process to proceed. I will not estimate
7 for all purposes.

8 Having determined that estimation is appropriate in
9 this case, I'll now turn to Accor's underlying claims.
10 Because I am estimating only for the limited purpose of
11 feasibility, it is not necessary for me to make specific
12 findings of fact on the merits of Accor's claim. And any
13 findings I make in connection with this ruling are certainly
14 not binding on the arbitrators who will be hearing the case
15 in the near future.

16 Debtors argue that the only appropriate basis for
17 awarding damages to Accor is by reference to the liquidated
18 damages provision of the HMA, which is clearly unambiguous.
19 Under that provision, damages should be awarded using the 12
20 months of management fees prior to breach termination date
21 and then applying a multiplier based on the remaining years
22 of the contract and discount that amount to present value.

23 Accor argues that, while the intent of the parties
24 can be determined by the HMA itself, it is clear that the
25 parties made a mistake when negotiating the HMA by failing to

1 account for the possibility that the hotel would be nearly
2 shut down for a year as a result of a worldwide pandemic.
3 Alternatively, Accor argues that the liquidated damages
4 provision was intended to ensure that Accor receive the
5 benefits of the contract through the remaining term of the
6 agreement and using the 12 months prior to March 2021 does
7 not achieve that result. Accor also raises claims for breach
8 of the covenants of quiet enjoyment, breach of contract and
9 rejection, and breach of the covenant of good faith and fair
10 dealing.

11 Despite Accor's counsel's statement during the --
12 during argument that denying reformation of the contract
13 would be an abuse of discretion, I think it is reasonably
14 likely that Accor will not succeed in its attempt to reform
15 the liquidated damages provision under California law for
16 either mistake or unreasonableness. To reform the HMA on the
17 basis of mistake, Accor would have to prove that the
18 liquidated damages provision does not reflect the true intent
19 of the parties. *Hess v. Ford Motor Company*, 27 Cal. 4th 516,
20 at 525 (Cal. Supreme Ct. 2002).

21 To reform on the basis of unreasonableness, Accor
22 would have to prove that the liquidated damages provision was
23 unreasonable under the circumstances existing when the
24 parties entered into the contract. *Viatech International,*
25 *Inc. v. Sporn*, 16 Cal. App. 5th 796, at 806 (Cal. Ct. App of

1 Appeals 2017).

2 Based on the evidence presented, I think it is
3 unlikely that Accor will meet either of these burdens.
4 Accor's witnesses who spoke to the intent of the liquidated
5 damages provision consistently stated that the intent is
6 reflected in the plain text of the HMA. Nor did Accor
7 present any evidence that the liquidated damages provision
8 was unreasonable when it was drafted, rather than as it is
9 applied now.

10 While the HMA states the purpose of the liquidated
11 damages provision is to provide Accor with compensation for
12 lost management fees and other damages over the remaining
13 term of the contract, the evidence showed that the parties
14 understood when they entered into the contract that using a
15 single previous year as a baseline for calculating liquidated
16 damages could result in wide fluctuations in the calculation
17 of liquidated damages in any given year.

18 While the parties might not have anticipated a
19 worldwide pandemic that could result in a near shutdown of
20 the hotel for a year, putting myself into the shoes of the
21 parties at the time the HMA was negotiated, as is required
22 under California law cited to be my Accor, the parties
23 certainly could have envisioned any number of other types of
24 scenarios that would have resulted in a closure of the hotel
25 for an extended period of time.

Moreover, the financials for the hotel show that management fees fluctuated from a high of approximately 2.2 million in 2000 to a low of less than 900,000 in 2010. It is also notable that, in the 20 years from 2020 -- or excuse me -- from 2000 to 2020, management fees never recovered to year 2000 levels. Moreover, following the precipitous drop in management fees during the Great Recession of 2008, it took 6 years to recover to 2007 management fee levels.

In hindsight, perhaps, Accor would have selected a different method of calculating liquidated damages. But of course, as California law provides, it is not appropriate to use hindsight to determine the intent of the parties at the time the HMA was negotiated. Again, none of this is binding on the arbitrators who will be hearing the case and -- as required under the contract, and they may come to a different conclusion.

I, likewise, think it is unlikely that Accor will be able to prove a breach of the covenant of quiet enjoyment or a breach of contract for rejection of the HMA. Indeed, Accor did not even press these arguments at the time of the estimation hearing, beyond arguing that debtors breached the HMA when it began negotiating with other hotel brands to take over management of the hotel.

Accor's argument is based upon a strained reading of the provisions of the HMA, providing that the hotel owner

1 may not affect a transfer without the prior written consent
2 of the hotel manager. Accor's argument is that the owner
3 could not choose a new hotel manager or even negotiate with
4 other brands without Accor's written consent. This argument
5 is unpersuasive for several reasons:

6 First, the plain language of the HMA shows that it
7 is meant to cover a transfer of the HMA to a new hotel owner,
8 not the hiring of a new hotel manager by existing owner.

9 Second, it would make the breach of -- the breach
10 termination provisions of the HMA superfluous because if the
11 owner could only change hotel managers with Accor's
12 permission, there could never be a breach termination.

13 And third, the argument is counter to California
14 law, which holds that a hotel owner is always allowed to
15 breach his hotel management contract. See Woolley v. Embassy
16 Suites, 227 Cal. App. 3d 1520, (Cal. Ct. App. 1991). Indeed,
17 Accor's own witness testified that this case was forefront in
18 negotiations of the liquidated damages provision at the time
19 the contract was negotiated.

20 However, Accor's claim for breach of the covenant
21 of good faith and fair dealing is different. California law
22 makes it clear that, quote:

23 "The covenant of good faith and fair dealing
24 implied by law in every contract exists merely to prevent one
25 contracting party from unfairly frustrating the other party's

1 right to receive the benefits of the agreement actually
2 made."

3 That's *Guz v. Bechtel National, Inc.*, 24 Cal. 4th
4 317, at 349 (Cal. Ct. App. 1992).

5 Quote, "Breach of a specific provision of the
6 contract is not a necessary prerequisite" to breach the
7 covenant of good faith and fair dealing. *Karma Development*
8 *California, Inc. v. Marathon Development California, Inc.*, 2
9 Cal. 4th 342, at 373 (1992).

10 California law is particularly concerned with,
11 quote:

12 "-- situations where one party is invested with a
13 discretionary power affecting the rights of another. Such
14 power must be exercised in good faith."

15 Karma Development at 372.

16 The debtors and Accor offered opposing, mutually
17 exclusive stories of why the HMA was terminated one year
18 after the start of COVID-19. Accor alleges that the debtors,
19 who had the absolute power to breach the HMA whenever they
20 chose, exercised that discretion to breach it in March of
21 2021. Excuse me. The debtors allege that they had the right
22 to breach at their discretion. Accor alleges that the
23 debtors decided to terminate the HMA and replace Accor with
24 Hilton months before they did so, but waited in order to
25 breach the HMA for an unreasonably low price. The debtors,

1 of course, disagree with this narrative and argue that they
2 were in negotiations with Accor and seriously considering not
3 terminating the HMA up until the date of the bankruptcy.
4 They alleged that they were losing money throughout the
5 pandemic and, if not for Accor's continued negotiations, they
6 would have terminated the HMA earlier, closing the hotel and
7 saving money.

8 Both sides presented evidence that tends to support
9 their narrative. Accor argued that, if they were successful
10 -- if they were to successfully prove a breach of the
11 covenant of good faith and fair dealing, they would be
12 entitled to lost profits over the remaining term of the HMA
13 from the date of the breach. Accor's expert Greig Taylor
14 calculated lost profits at 22.24 million. The debtors'
15 expert, Francis Nardozza, performed a more limited
16 calculation of lost profits, but ultimately settled on a
17 little over 19 million in his report. Debtors did not
18 present expert testimony on the amount of the potential
19 damages in the event of a breach of the covenant of good
20 faith and fair dealing.

21 Based on the evidence presented, it is reasonable
22 to me that Accor may succeed in proving their claim for
23 breach of the covenant of good faith and fair dealing and be
24 entitled to breach damages. Neither party specifically
25 addressed what the proper calculation for damages for breach

1 of the implied covenant of good faith and fair dealing would
2 be if the breach occurred at some point prior to breach
3 termination on March 5, 2021, and the interplay of that
4 breach with the liquidated damages provision of the HMA.

5 For example, if a finder of fact determined that a
6 breach of the covenant occurred in December of 2020 and
7 applied the liquidated damages provision as of that date,
8 what would the proper calculation of damages be? Based on
9 the record, I do not have an answer to that question.

10 Given that I'm only estimating damages for purposes
11 of plan feasibility, prudence dictates that I estimate
12 Accor's claim at the highest value they could reasonably
13 receive to ensure that they would be -- there will be funds
14 necessary if Accor ultimately is successful with its claim;
15 that is, the amount of lost profits over the term of the
16 remaining time of the contract, without applying the
17 liquidated damages provision. I will therefore estimate the
18 value of Accor's claim at 22.24 million. The parties should
19 confer and submit an appropriate form of order consistent
20 with this ruling.

21 Any questions?

22 (No verbal response)

23 THE COURT: All right. Anything else before we
24 adjourn?

25 (No verbal response)

1 THE COURT: All right. Thank you, all. We are
2 adjourned.

3 UNIDENTIFIED: Thank you, Your Honor. Thank you,
4 Your Honor.

5 (Proceedings concluded at 11:25 a.m.)

6 *****

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of my knowledge and ability.

A handwritten signature in cursive script, appearing to read "Coleen Rand", is written over a horizontal line.

June 29, 2021

Coleen Rand, AAERT Cert. No. 341

Certified Court Transcriptionist

For Reliable